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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION 4

THE PEOPLE,

Plaintiff and Respondent,

v.

LESLIE ROBERT HIDAS,

Defendant and Appellant.

A145844

(San Mateo County  
Super. Ct. No. SC081901A)

Defendant appeals a judgment entered upon his plea of no contest to the unlawful driving or taking of a motor vehicle. (Veh. Code, § 10851, subd. (a).) Defendant was ordered to pay \$31,043 in restitution to the victim as a condition of his probation. He contends on appeal that the evidence does not support the award and that there was an insufficient nexus between the circumstances of his criminal misconduct and the restitution award. We shall affirm the judgment.

**I. BACKGROUND**

In June 2014, a GMC Sierra truck and two trailers carrying a number of tools were reported missing from a fenced-in work site belonging to JAW Excavation. Defendant was charged with felony driving or unlawful taking of a pickup truck owned by JAW Excavation (Veh. Code, § 10851, subd. (a)) (count 1), felony receiving the stolen vehicle (Pen. Code,<sup>1</sup> § 496d, subd. (a)) (count 2), and misdemeanor receiving stolen property

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<sup>1</sup> All undesignated statutory references are to the Penal Code.

belonging to Charles Young Watts (§ 496, subd. (a)) (count 3).<sup>2</sup> In connection with counts 1 and 2, the information alleged defendant had previously been convicted of violating Vehicle Code section 10851, subdivision (a). (§ 666.5, subd. (a).)

On October 30, 2014, defendant pleaded no contest to Count 1 with a *Harvey* waiver and admitted the special allegation as to his prior conviction. (*People v. Harvey* (1979) 25 Cal.3d 754.) The remaining counts were dismissed. The defendant was placed on probation and the matter was referred for a restitution report and hearing.

At the April 3, 2015 restitution hearing, the parties stipulated that defendant would pay \$1,000 for the insurance deductible for the truck and \$2,500 for miscellaneous expenses.<sup>3</sup> The matter was continued for a further hearing on defendant's culpability for the missing tools, the value of the tools, and the costs of travel to the hearing.

The continued restitution hearing took place on July 24, 2015 before a different judge. The victims sought a lesser restitution award than the restitution report recommended because the original amount requested related to all three vehicles stolen from the JAW Excavation site and defendant was only responsible for the truck. James Whitfield, the owner of JAW Excavation, testified that the company truck was stolen sometime between June 26 and June 30, 2014 from a job site. He stated the truck was "loaded [with] probably about \$80[,000] to \$100,000 worth of tools." His office staff spent "40 hours of office time" compiling a list of the missing tools from the stolen truck. The list included itemized costs for various large tools and a lump sum for miscellaneous small tools, for a total of \$35,368.<sup>4</sup>

Whitfield did not provide invoices for all of the tools. He testified that he had worked in the construction industry between 26 and 27 years, he was personally familiar

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<sup>2</sup> The license plates on the stolen truck belonged to Watts, who stated his plates had been stolen in July.

<sup>3</sup> The restitution report explained that the miscellaneous expenses consisted of the costs of recovering the truck, water tank, and trailer, the time spent assisting police, and the labor cost to replace tools and equipment.

<sup>4</sup> Whitfield testified that this was not a complete list of the tools in the truck.

with each of the tools for which he sought restitution, and based on his experience, the value he claimed for the tools was accurate.

The trial court ordered restitution of \$31,043 as follows: \$1,736 for two hot saws, \$3,100 for two jumping jacks, \$7,048 for miscellaneous tools, \$11,588 for miscellaneous tools/other losses, \$1,000 for insurance deductible, \$871 for time to retrieve the vehicle/court travel, \$900 for Whitfield's personal time, and \$4,800 for 40 hours spent by JAW Excavations' employees compiling information on the loss of inventory.

The court separately ordered restitution in an amount to be determined later for a three-dimensional scope laser.

## **I. DISCUSSION**

### **A. Substantial Evidence of Restitution**

On appeal, we review the trial court's restitution order for abuse of discretion. (*People v. Giordano* (2007) 42 Cal.4th 644, 663 (*Giordano*); *People v. Gemelli* (2008) 161 Cal.App.4th 1539, 1542 (*Gemelli*).) We will not reverse the order unless it is arbitrary or capricious. (*Gemelli, supra*, at p. 1542.) "No abuse of discretion will be found where there is a rational and factual basis for the amount of restitution ordered." (*Ibid.*)

"The abuse of discretion standard is 'deferential,' but it 'is not empty.' [Citation.] . . . [W]hile a trial court has broad discretion to choose a method for calculating the amount of restitution, it must employ a method that is rationally designed to determine the surviving victim's economic loss. To facilitate appellate review of the trial court's restitution order, the trial court must take care to make a record of the restitution hearing, analyze the evidence presented, and make a clear statement of the calculation method used and how that method justifies the amount ordered." (*Giordano, supra*, 42 Cal.4th at pp. 663–664.)

Section 1202.4, subdivision (f), provides that "in every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing

to the court.” (§ 1202.4, subd. (f).) “ “ “Section 1202.4 does not, by its terms, require any particular kind of proof. However, the trial court is entitled to consider the probation report, and, as prima facie evidence of loss, may accept a property owner’s statement made in the probation report about the value of stolen or damaged property.” [Citation.]’ ” (*People v. Lockwood* (2013) 214 Cal.App.4th 91, 96; *Gemelli, supra*, 161 Cal.App.4th at pp. 1542–1545; see *In re S.S.* (1995) 37 Cal.App.4th 543, 546 (S.S.) [itemized statement of items lost by victim].)

“ “ “When a trial court’s factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the determination.” ’ ” (*Gemelli, supra*, 161 Cal.App.4th at p. 1545.) “The defendant has the burden of rebutting the victim’s statement of losses, and to do so, may submit evidence to prove the amount claimed exceeds the repair or replacement cost of damages or stolen property.” (*Id.* at p. 1543; *People v. Fulton* (2003) 109 Cal.App.4th 876, 886.)

The facts in the instant case meet the standard of *Lockwood* and *Gemelli*. The People made a prima facie case supported by testimony of the victim, who was subject to cross-examination, and defendant failed to meet his burden to show that the victim’s claim was inflated. Defendant contends that it is “hard to comprehend” that the calculation of the time spent by the employees in preparing the list of missing tools was correct and that the various loss items were “inflated.” However, Whitfield’s testimony concerning the time his employees spent was not inherently incredible and we defer to the trial court’s credibility determination. (*People v. Baker* (2005) 126 Cal.App.4th 463, 469; *Gemelli, supra*, 161 Cal.App.4th at pp. 1545–1546; cf. *People v. Jones* (2010) 187 Cal.App.4th 418 [trial court abused its discretion when it stated it had a number but did not say what that number was].) The trial court explained its reasoning in the calculation of the restitution award and the evidence supports the court’s conclusion.

Defendant relies on *People v. Vournazos* (1988) 198 Cal.App.3d 948 (*Vournazos*) to argue that a victim’s bare statement of losses is insufficient to sustain an order for

restitution. The Court of Appeal in *Vournazos* concluded that a restitution award was not supported by substantial evidence where the trial court relied solely on the recommendation of a probation officer, who in turn based his recommendation only on the victim's statement of loss. (*Id.* at pp. 958–959.)

Numerous courts, however, have declined to follow *Vournazos*, concluding that it was inconsistent with the rule that it is the defendant who bears the burden of proving the restitution amount claimed by the victim exceeds the cost of repairing or replacing the lost property. (*S.S., supra*, 37 Cal.App.4th at p. 546–548 & fn. 2 [victim not required to verify statement of value with sworn statements, testimony, or other documentation]; see *People v. Foster* (1993) 14 Cal.App.4th 939, 946–948 [owner's opinion of value of his or her property is sufficient to establish value]; see also *Gemelli, supra*, 161 Cal.App.4th at pp. 1543–1544 [victim's written statement of costs of repairs attached to probation report was prima facie showing for restitution].) We agree with the reasoning of these cases. In any case, the award here is not supported simply by a probation officer's hearsay statement, but by the victim's live testimony.

Defendant also contends that, at the continued restitution hearing on July 24, 2015, the trial court improperly ordered restitution that had already been awarded at the April 3, 2015 hearing pursuant to the parties' stipulation. This claim fails. First, although the parties entered into a stipulation on the original hearing, no restitution was actually ordered until the July 23 hearing.<sup>5</sup> And at that hearing, defendant did not contend that the award violated the terms of the prior stipulation. (See *People v. Scott* (1994) 9 Cal.4th 331, 353–354 [objection to discretionary sentencing choice waived if not made in the trial court]; accord, *People v. O'Neal* (2004) 122 Cal.App.4th 817, 820.)

For all of these reasons, we reject defendant's contention that the evidence does not support the restitution award.

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<sup>5</sup> Defense counsel told the trial court at the outset of the July 24 hearing that no restitution orders had yet been imposed.

## **B. Relation Between Restitution Award and Future Criminality**

Defendant contends that the restitution amount imposed was based on insufficient proximate cause between the circumstances of his misconduct and the loss the victim sustained. He argues that he was neither charged with nor convicted of stealing the truck, but only of driving it, and there was no evidence he was involved with the actual theft; therefore, he contends, he should not be held responsible for the loss of the tools that were in it when it was stolen.

“In granting probation, courts have broad discretion to impose conditions to foster rehabilitation and to protect public safety pursuant to [section] 1203.1. [Citation.] . . . [¶] California courts have long interpreted the trial courts’ discretion to encompass the ordering of restitution as a condition of probation even when the loss was not necessarily caused by the criminal conduct underlying the conviction. Under certain circumstances, restitution has been found proper where the loss was caused by related conduct not resulting in a conviction [citation], by conduct underlying dismissed and uncharged counts [citation], and by conduct resulting in an acquittal [citation]. There is no requirement the restitution order be limited to the exact amount of the loss in which the defendant is actually found culpable, nor is there any requirement the order reflect the amount of damages that might be recoverable in a civil action.” (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120–1121 (*Carbajal*)). Thus, the court may “order restitution as a condition of probation where the victim’s loss was not the result of the crime underlying the defendant’s conviction, but where the trial court finds such restitution will serve one of the purposes set out in [section] 1203.1, subdivision (j).” (*Id.* at p. 1122.)

As explained in *In re I.M.* (2005) 125 Cal.App.4th 1195 (*I.M.*), “an order of restitution is permitted even if the act for which the defendant is ordered to make restitution was not committed with the same state of mind as that required for the crime that proximately caused the loss. It is enough that conditioning probation on a restitution order ‘would make amends “to society for the breach of the law, for any injury done to any person resulting from that breach . . . .” ’ [Citation.]” (*Id.* at p. 1210.) In *I.M.*, the appellate court upheld a restitution order to pay, as a condition of probation, \$15,184.43

to cover the expenses for the victim's funeral where the defendant acted as an accessory after the fact to murder. (*Id.* at p. 1208.) This decision was based on the court's power to impose conditions to foster rehabilitation and protect public safety so long as it is "reasonably related to the crime of which the defendant was convicted or to future criminality." (*Id.* at p. 1209.)

Our Supreme Court has held that "[a] condition of probation will not be held invalid unless it '(1) has no relationship to the crime of which the offender was convicted, (2) relates to the conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality . . . .' [Citation.]" (*People v. Lent* (1975) 15 Cal.3d 481, 486 (*Lent*)). Probation conditions are not to be invalidated unless they fail all three of the *Lent* criteria. (*Ibid.*) Moreover, a "*Harvey* waiver permits a trial court to consider facts underlying dismissed counts in determining the appropriate disposition for the offense of which the defendant was convicted." (*People v. Moser* (1996) 50 Cal.App.4th 130, 132–133.)

Applying these standards, we conclude that the trial court did not abuse its discretion in ordering defendant to pay restitution for the loss of the tools as a condition of probation. The restitution here relates to the crime of which defendant was convicted. Defendant was found driving the stolen vehicle that had contained the tools, and was ordered to pay restitution for the share of the missing tools that were in the truck when it was stolen. Whether or not defendant himself stole the tools, theft of the tools had a clear connection to the crime of which defendant was convicted. Moreover, the restitution is reasonably related to curbing future criminal misconduct by defendant. This was not defendant's first offense involving unlawfully taken vehicles: he had a prior conviction for unlawfully taking or driving a vehicle. The restitution order thus serves a rehabilitative purpose by forcing him to face the consequences of involvement with stolen property. (See *In re T.C.* (2009) 173 Cal.App.4th 837, 848 [restitution order reasonable to deter future criminality where appellant continued to involve himself in vehicle theft while on probation for offenses related to vehicle theft].)

Defendant challenges this conclusion, arguing that restitution is improper unless his criminal conduct actually caused the victim's harm. For this argument, he relies on *People v. Jones* (2010) 187 Cal.App.4th 418, which concluded that victim restitution was limited by principles of proximate causation. *Jones*, however, applied only section 1202.4 (requiring restitution where "the victim has suffered economic loss *as a result* of the defendant's conduct" (§ 1202.4, subd. (f), *italics added*), and did not consider the rules applicable to restitution as a condition of probation under section 1203.1. This provision "requires trial courts to 'consider whether the defendant as a condition of probation shall make restitution to the victim or the Restitution Fund,' and requires the court to 'provide for restitution in proper cases.' ([§ 1203.1], subds. (b) & (a)(3))." (*Carbajal, supra*, 10 Cal.4th at p. 1121.) Our Supreme Court has made clear that a trial court's discretion extends to ordering "restitution as a condition of probation even when the loss was not necessarily caused by the criminal conduct underlying the conviction." [Citation.]” (*People v. Anderson* (2010) 50 Cal.4th 19, 27; see § 1203.1.) Indeed, *People v. Woods* (2008) 161 Cal.App.4th 1045, 1049–1050, upon which defendant relies, recognizes that where probation is granted, restitution awards are not limited to losses arising out of the criminal conduct underlying the conviction. (Accord, *People v. Lai* (2006) 138 Cal.App.4th 1227, 1248.)

Bearing in mind the trial court's broad discretion, we conclude the court could reasonably impose restitution for the stolen tools and related costs. The order was not arbitrary or capricious, as it satisfied the requirements of section 1203.1 and *Lent, supra*, 15 Cal.3d 481. The granting of probation is not a right, but a privilege, and defendant had the option of refusing probation if he found the terms harsher than a prison sentence. (*People v. Percelle* (2005) 126 Cal.App.4th 164, 179.)

### **III. DISPOSITION**

The judgment is affirmed.



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Rivera, J.

We concur:

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Ruvolo, P.J.

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Reardon, J.

